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CITY OF BURBANK, including the Police
Department of the City of Burbank

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES**

OMAR RODRIGUEZ; CINDY GUILLEN-
GOMEZ; STEVE KARAGIOSIAN;
ELFEGO RODRIGUEZ; AND JAMAL
CHILDS,

Plaintiffs,

-vs-

BURBANK POLICE DEPARTMENT;
CITY OF BURBANK; TIM STEHR;
KERRY SCHILF; JAMIE "J.J." PUGLISI;
DAN YADON; KELLY FRANK; PAT
LYNCH; MIKE PARRINELLO; AARON
KENDRICK; DARIN RYBURN; AND
DOES 1 THROUGH 100, INCLUSIVE.

Defendants.

CASE NO: BC 414602
[Assigned to Hon. Joanne O'Donnell,
Dept. 37]

**DEFENDANT CITY OF BURBANK'S
REQUEST FOR JUDICIAL NOTICE IN
SUPPORT OF MOTION FOR
SUMMARY
JUDGMENT/ADJUDICATION OF
ISSUES; DECLARATION OF
CHRISTINE T. HOFFNER; EXHIBIT**

Date: March 18, 2010 [Date reserved]
Time: 9:00
Dept.: 37
Trial: Aug. 25, 2010
Action filed: May 28, 2009

1 TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

2
3 Defendant CITY OF BURBANK, including the Police Department of the City of Burbank
4 ("Burbank") requests judicial notice of the following documents, which are attached hereto:

5
6 The court's file in the injunction proceedings in Rodriguez v. Burbank Police Department,
7 et. al, case BC 414602, heard by Judge Chalfant in Department 85, writs and receivers, including:

8 1. The court's minute order on Burbank's motion for a preliminary
9 injunction, entered on August 27, 2009. (Exh. A hereto.)

10 2. The court's detailed order on Burbank's motion for a preliminary
11 injunction, entered on August 27, 2009. (Exh. B hereto.)

12 3. The court's minute order on Burbank's motion for return of documents
13 entered on October 13, 2009. (Exh. C hereto.)

14 4. The court's detailed order on Burbank's motion for return of documents
15 entered on October 13, 2009. (Exh. D hereto.)

16 The grounds on which this request for judicial notice is made are that (1) Evidence Code
17 sections 452 and 459 allow such judicial notice, (2) the documents of which this court is
18 requested to take judicial notice are relevant to issues raised by plaintiff Jamal Childs in
19 opposition to Burbank's summary judgment motion in which Childs contends that Burbank
20 violated POBRA by asking for a waiver after discovering other plaintiffs had possession of stolen
21 department documents. .

22 **I. Grounds for Request for Judicial Notice**

23 This court "may take judicial notice of any matter specified in [Evidence Code] Section
24 452." (Evid. Code, § 459, subd. (a).) Section 452 specifies that judicial notice may be taken of
25 "Records of (1) any court of this state", and "facts and propositions that are not reasonably
26 subject to dispute and are capable of immediate and accurate determination by resort to sources
27 of reasonably indisputable accuracy." (Evid. Code, § 452, subd. (d), (h).)

28 In opposition to Burbank's pending summary judgment motion, Childs argues that

1 Burbank improperly asked the court to require plaintiffs who were the subject of the above
2 injunction proceedings to sign waivers after discovering they had possession of stolen department
3 documents. The orders on the injunctions are attached hereto as exhibits A and B. The orders on
4 the subsequent motion to compel the return of documents are attached hereto as exhibits C and
5 D.

6 The waiver was sought as to the few documents the court allowed *other* plaintiffs to keep
7 possession of. Childs was not one of the plaintiffs in possession of stolen documents against
8 whom the injunction proceedings took place of or from whom a waiver needed to be sought.

9 **CONCLUSION**

10 Judicial notice should be granted as requested.

11
12 DATED: March 12, 2010

BALLARD ROSENBERG GOLPER & SAVITT, LLP

13
14 By: 

CHRISTINE T. HOEFFNER

Attorneys for Defendant

CITY OF BURBANK, including the Police Department of
the City of Burbank

DECLARATION OF CHRISTINE T. HOEFFNER IN SUPPORT OF REQUEST FOR JUDICIAL NOTICE

I, CHRISTINE T. HOEFFNER, declare as follows:

1. I am an attorney at law duly licensed to practice before all of the courts in the State of California. I am Senior Counsel with Ballard Rosenberg Golper & Savitt LLP ("BRGS"), attorneys for Defendant CITY OF BURBANK, including the Police Department of the City of Burbank ("Burbank") in this litigation. I make this declaration of my own personal knowledge.

2. Defendant Burbank filed a summary judgment motion against plaintiff Jamal Childs in this case to which Childs has now filed an opposition. In his opposition, Childs argues as to his newly asserted POBRA claim that Burbank improperly asked the court to require the *other* plaintiffs in this case to sign waivers after discovering they had possession of stolen department documents. Childs was not one of the plaintiffs who had taken documents. The request for a waiver was made because the court ordered other plaintiffs to return certain documents to the city, but allowed them keep a few documents. To protect the city from claims of breach of confidentiality in the event these plaintiffs (who are now in possession of some confidential documents) allowed these documents to be disclosed to others, a waiver was requested.

3. In this court's file for this case are copies of the following orders, which are attached hereto for this court's convenience. A true and correct copy of Judge Chalfant's August 27, 2009 minute order granting defendant a preliminary injunction is attached hereto as exhibit "A". A true and correct copy of the court's August 27, 2009 detailed order granting defendant a preliminary injunction is attached hereto as exhibit "B". A true and correct copy of the court's October 13, 2009 minute order is attached hereto as exhibit "C". A true and correct copy of the court's October 13, 2009 detailed order compelling the plaintiffs to return the documents is attached hereto as exhibit "D".

I declare under penalty of perjury of the laws of the State of California that the foregoing is true and correct and signed March 12, 2010 at Glendale California.


CHRISTINE T. HOEFFNER

EXHIBIT A

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 08/27/09

DEPT. 85

HONORABLE JAMES C. CHALFANT

JUDGE

A. FAJARDO

DEPUTY CLERK

HONORABLE
#2

JUDGE PRO TEM

ELECTRONIC RECORDING MONITOR

J. DE LUNA, C.A.

Deputy Sheriff

J. CAMPBELL, CSR #11859

Reporter

9:30 am

BC414602

Plaintiff
Counsel

SOLOMON E. GRESEN [X]

OMAR RODRIGUEZ ET AL

Defendant
Counsel

LINDA MILLER SAVITT [X]

VS

VERONICA VON GRABOW [X]

BURBANK POLICE DEPARTMENT ET AL

MARC J. BERGER [X]

NATURE OF PROCEEDINGS:

ORDER TO SHOW CAUSE RE: PRELIMINARY INJUNCTION AND
TEMPORARY RESTRAINING ORDER

The matter is called for hearing.

Counsel read the Court's tentative ruling.

After argument of Counsel, the Court rules in
accordance with it's tentative which is orally
modified, adopted and filed as the final ruling of
the Court.

The OSC Re: Preliminary Injunction is granted in part.

Counsel are ordered to meet and confer, face to face,
to discuss all issues as to the remaining records and
the investigative reports that refer to the Plaintiff
but also refer to others. The meet and confer must
take place on or before 9/15/09.

The Deponents are instructed to answer all questions
unless they are asserting privilege. Counsel may not
instruct them otherwise.

All items in the Plaintiffs possession are ordered
returned forthwith to the Defendant by federal
express.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 08/27/09

DEPT. 85

HONORABLE JAMES C. CHALFANT

JUDGE

A. FAJARDO

DEPUTY CLERK

HONORABLE
#2

JUDGE PRO TEM

ELECTRONIC RECORDING MONITOR

J. DE LUNA, C.A.

Deputy Sheriff

J. CAMPBELL, CSR #11859

Reporter

9:30 am

BC414602

Plaintiff
Counsel

SOLOMON E. GRESEN [X]

OMAR RODRIGUEZ ET AL

Defendant
Counsel

LINDA MILLER SAVITT [X]

VS

VERONICA VON GRABOW [X]

BURBANK POLICE DEPARTMENT ET AL

MARC J. BERGER [X]

NATURE OF PROCEEDINGS:

If Counsel cannot agree on the remaining discovery issues, they may apply Ex Parte to set a briefing schedule.

This case is now transferred back to Department 37 for all further proceedings.

Counsel for the Defendant is to give notice.

EXHIBIT B

Orally Modified

Rodriguez, et al. v. Burbank Police
Department
BC 414602

Tentative decision on OSC re: preliminary
injunction: granted in part

FILED
Superior Court of California
County of Los Angeles

AUG 27 2009

John A. Clarke, Executive Officer/Clerk
By A. Saez, Deputy
JANETTE FAJARDO

Defendants City of Burbank ("City") and Burbank Police Department ("Department") move for a preliminary injunction requiring Plaintiffs and their attorneys to return the originals and all copies of various documents in their possession, custody or control which Defendants contend are confidential peace officer personnel records. The court has read and considered the moving papers, the City's supplemental brief,¹ opposition, and replies, and renders the following tentative decision.

A. Statement of the Case

On May 28, 2009, Plaintiffs filed a Complaint against the Department and various individual Defendants alleging various forms of discrimination and harassment.

On August 6, 2009, Defendants applied *ex parte* for a temporary restraining order ("TRO") and order to show cause ("OSC") re: preliminary injunction restraining Plaintiffs from using any documents from the personnel files of third party police officers in Plaintiffs' possession, and ordering Plaintiffs to gather and return to the City all copies of such records. The court issued a protective order requiring that all Department personnel records in Plaintiffs' possession be collected and maintained in a separate location in Plaintiffs' counsel's office and that such records not be used directly or derivatively pending hearing on the OSC. The parties were directed to file supplemental briefs on the issue of whether the records were personnel records protected by privilege and must be returned to the Department.

B. Applicable Law

An injunction is a writ or order requiring a person to refrain from a particular act; it may be granted by the court in which the action is brought, or by a judge thereof; and when granted by a judge, it may be enforced as an order of the court. CCP §525. An injunction may be more completely defined as a writ or order commanding a person either to perform or to refrain from performing a particular act. See Comfort v. Comfort (1941) 17 Cal.2d 736, 741. McDowell v. Watson (1997) 59 Cal.App.4th 1155, 1160.² It is an equitable remedy available generally in the protection or to prevent the invasion of a legal right. Meridian, Ltd. v. City And County of San

¹The supplemental brief filed by the individual third party officers was not served by email on Plaintiffs' counsel as required by the court's August 6 order, and was not received by Plaintiffs' counsel in the regular mail until August 14, 2009. As a result of this violation, the individual officers' supplemental brief has not been considered.

²The courts look to the substance of an injunction to determine whether it is prohibitory or mandatory. Agricultural Labor Relations Bd. v. Superior Court, (1983) 149 Cal.App.3d 709, 713. A mandatory injunction--one that mandates a party to affirmatively act, carries a heavy burden: "[t]he granting of a mandatory injunction pending trial is not permitted except in extreme cases where the right thereto is clearly established." Teachers Ins. & Annuity Assoc. v. Furlotti, (1999) 70 Cal.App.4th 187, 1493.

Francisco, et al. (1939) 13 Cal.2d 424.

The purpose of a preliminary injunction is to preserve the *status quo* pending final resolution upon a trial. See Scaringe v. J.C.C. Enterprises, Inc. (1988) 205 Cal.App.3d 1536. Grothe v. Cortlandt Corp. (1992) 11 Cal.App.4th 1313, 1316; Major v. Miraverde Homeowners Assn. (1992) 7 Cal.App.4th 618, 623. The *status quo* has been defined to mean the last actual peaceable, uncontested status which preceded the pending controversy. Voorhies v. Greene (1983) 139 Cal.App.3d 989, 995, quoting United Railroads v. Superior Court (1916) 172 Cal. 80, 87. 14859 Moorpark Homeowner's Assn. v. VRT Corp. (1998) 63 Cal.App.4th 1396, 1402.

A preliminary injunction is issued after hearing on a noticed motion. The complaint normally must plead injunctive relief. CCP §526(a)(1)-(2).³ Preliminary injunctive relief requires the use of competent evidence to create a sufficient factual showing on the grounds for relief. See e.g. Ancora-Citronelle Corp. v. Green, 41 Cal.App.3d 146, 150. Injunctive relief may be granted based on a verified complaint only if it contains sufficient evidentiary, not ultimate, facts. See CCP §527(a). For this reason, a pleading alone rarely suffices. Weil & Brown, California Procedure Before Trial, 9:579, 9(11)-21 (The Rutter Group 2007). The burden of proof is on the plaintiff as moving party. O'Connell v. Superior Court, (2006) 141 Cal.App.4th 1452, 1481.

A plaintiff seeking injunctive relief must show the absence of an adequate damages remedy at law. CCP §526(4); Thayer Plymouth Center, Inc. v. Chrysler Motors, (1967) 255 Cal.App.2d 300, 307; Department of Fish & Game v. Anderson-Cottonwood Irrigation Dist. (1992) 8 Cal.App.4th 1554, 1565. The idea "inadequacy of the legal remedy" or "inadequacy of damages" dates from the time of the early courts of chancery, the idea being that an injunction is an unusual or extraordinary equitable remedy which will not be granted if the remedy at law (usually damages) will adequately compensate the injured plaintiff. Department of Fish & Game v. Anderson-Cottonwood Irrigation Dist. (1992) 8 Cal.App.4th 1554, 1565.

In determining whether to issue a preliminary injunction, the trial court considers two factors: (1) the reasonable probability that the plaintiff will prevail on the merits at trial (CCP §526(a)(1)), and (2) a balancing of the "irreparable harm" that the plaintiff is likely to sustain if the injunction is denied as compared to the harm that the defendant is likely to suffer if the court grants a preliminary injunction. CCP §526(a)(2) 14859 Moorpark Homeowner's Assn. v. VRT Corp. (1998) 63 Cal.App.4th 1396, 1402; Pillsbury, Madison & Sutro v. Schectman (1997) 55 Cal.App.4th 1279, 1283; Davenport v. Blue Cross of California (1997) 52 Cal.App.4th 435, 446; Abrams v. St. Johns Hospital (1994) 25 Cal.App.4th 628, 636. Thus, a preliminary injunction may not issue without some showing of potential entitlement to such relief. Doe v. Wilson (1997) 57 Cal.App.4th 296, 304. The decision to grant a preliminary injunction generally lies within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. Thornton v. Carlson (1992) 4 Cal.App.4th 1249, 1255.

A preliminary injunction ordinarily cannot take effect unless and until the plaintiff provides an undertaking for damages which the enjoined defendant may sustain by reason of the injunction if the court finally decides that the plaintiff was not entitled to the injunction. See

³However, a court may issue an injunction to maintain the *status quo* without a cause of action in the complaint. CCP §526(a)(3).

CCP §529(a); City of South San Francisco v. Cypress Lawn Cemetery Assn. (1992) 11 Cal.App.4th 916, 920.

C. Analysis

Defendants seek the return of third party police officer personnel records in the possession of Plaintiffs' counsel. Defendants identify the records at issue by Bates number in the Declaration of Tim Stehr.⁴ Both the City and the individual officers⁵ are asserting the privilege and seeking injunctive relief for the release of confidential personnel information and records.

Penal Code section 832.7 provides that peace officer personnel records, and information obtained from these records, are privileged and confidential and shall not be disclosed in any criminal or civil proceeding except by discovery pursuant to Evidence Code Section 1043. See Penal Code §832.7 ("peace officer personnel records. . . are confidential and shall not be disclosed in any criminal or civil proceeding, except by discovery pursuant to Section 1043 of the Evidence Code).

"Personnel records" are defined as any file maintained under an officer's name by his or her employing agency and containing records relating to any of the following: "(a) Personal data, including marital status, family members, educational and employment history, home addresses, or similar information. (b) Medical history. (c) Election of employee benefits. (d) Employee advancement, appraisal, or discipline. (e) Complaints, or investigations of complaints, concerning an event or transaction in which he or she participated, or which he or she perceived, and pertaining to the manner in which he or she performed his or her duties. (f) Any other information the disclosure of which would constitute an unwarranted invasion of personal privacy." Penal Code §832.8.

Section 832.7 protects peace officer personnel records against disclosure except pursuant to the Pitchess procedures of Evidence Code section 1043 and 1045. See City of Santa Cruz v. Superior Court, (1987) 190 Cal.App.3d 1669. It prohibits any disclosure of police personnel records and is not limited to those made in a legal proceeding. See Copley Press v. Superior Court, (2006) 39 Cal.4th 1272, 1284-86. "[T]he privilege against disclosure of official police records is held both by the individual officer involved and by the police department." Davis v. City of Sacramento, (1994) 24 Cal.App.4th 393, 401.

Police personnel records are customarily maintained in either a general personnel file or a separate file containing complaints and reports or findings relating to complaints maintained for five years. Penal Code §832.5. However, despite the literal language of section 832.8 in referring to a personnel "file," the content of the document, not its location, is determinative. Otherwise, a clearly public document such as a newspaper article could be deemed confidential if placed in an otherwise protected personnel file. Therefore, only the types of information

⁴The City's supplemental brief adds two documents, Bates OR 385 and OR 340, to the application.

⁵Officer Anthony Valento has withdrawn the application for injunctive relief brought on his behalf.

enumerated in section 832.8 constitute protected peace officer personnel records. Commission on Peace Officer Standards & Training v. Superior Court, (2007) 42 Cal.4th 278, 290-91. The category of "personal data" in section 832.8 includes the type of information normally supplied by an employee to his or her employer, and does not include information, such as salary arising from the officer's employment with the police department. International Federation of Professional & Technical Engineers, (2007) 42 Cal.4th 319, 342-43.

The City's *ex parte* application sought the return of police personnel records only. In support of that application, the City submitted the Declaration of Tim Stehr, its police chief, who stated that all of the Bates-stamped records in question were confidential police personnel records. This declaration is impermissibly vague and conclusory to constitute sufficient evidence to meet the City's burden of proof that the records in question are police personnel records.

In response to the *ex parte* application, Plaintiffs' counsel reviewed the list of Bates-stamped documents identified by the City as constituting confidential peace officer personnel records, and has determined that many do qualify as personnel records under section 832.8. Those documents have been returned, and all electronic copies destroyed. Plaintiffs contend that the remaining documents are not peace officer personnel records, but are simply business records of the City. Plaintiffs have described the documents and proffered argument as to why those documents need not be returned.

The argue, and the court agrees, that standing alone the following documents by themselves are not police officer personnel records: (1) Memoranda Requesting an Interview with a Witness or Criminal Defendant (OR 400, 401, 502, 1032, 1033, 1134, 1243, 1244, 1345, CG 0400, 0401, 0502). A memorandum requesting a meeting with a witness does not contain personal information about a police officer; (2) DMV Records of a Criminal Defendant (OR 402, 1034, CG 0402) DMV records of a third party are public information. See Veh. Code §1808; Govt. Code §62353 *et seq.*; (3) ICE Transfer Records of a Criminal Defendant (OR 403, 528-529, 531, 1035, 1160-1163, 1246, 1371-1372, CG 0403, 0528-0529) Deportation records of a criminal defendant are not personnel records pursuant to section 832.8; (4) Department of Justice Record of Deportable Alien (OR 404-405, 1036-1037, 1247-1248, 1373-1374, CG 0404-0405, 0530-0531) Documents describing the deportation of a criminal defendant are not police personnel records; (5) Arrest Records, Booking Records, and/or Police Reports Regarding the Arrest of Criminal Defendants (OR 464-493, 503-527, 1096-1125, 1135-1159, 1307-1336, 1346-1370) Arrest records of non-officer suspects contain no personal information about the arresting officers; (6) Pursuit Reports (OR 1026, 1028, 1238-1239, CG 0395-0396, 0464-0493, 0503-0527) A pursuit report contains information regarding the pursuit of a criminal suspect and is not a personnel record; and (7) Business Cards (OR 1245) A business card is not a personnel record.

In reply, the City and the individual officers argue that there is a difference between a non-protected document placed in a personnel file simply to hide it and a document that is attached to an investigative report to as an exhibit or placed in the file to give it context, background, or reference and to lend intelligibility to the documents directly revealing an investigation of the pertinent officer. In support, the City provides a much more detailed Declaration of Tim Stehr identifying the remaining Bates-stamped pages at issue and explaining why the documents are protected.

The vast majority of the otherwise innocent documents at issue are documents that are

referenced and contained in an administrative investigation of third party police officers. A number of them were authored by Plaintiff Rodriguez as an internal affairs investigator. Although standing alone these documents are not personnel records, they are when attached to an investigative report as evidence or an exhibit. It is no different than if the exhibit had been directly quoted within the investigative report. Any risk that the Department will try to hide a document from disclosure in a personnel file is disposed of by the fact that the investigative report refers to and relies on the document. Thus, the above otherwise innocent records are cloaked with police personnel record confidentiality where they were attached and referred to in an investigative report protected by section 832.8. Therefore, Plaintiffs must return the records listed in the Stehr declaration as having been "referenced in and contained in an administrative investigation of a third party."

In addition, the following documents are personnel records: (1) memos from a deputy chief to the chief of police concerning an internal investigation (OR578, OR1210, OR1425, and CG578). Stehr Decl. ¶16; (2) a comment card for a third party police officer is also a personnel record (OR1022, OR1232, CG390). Stehr Decl. ¶17; and (3) the ranking results for promotion to police detective (CG385). Stehr Decl. ¶23. As the City argues, detective rankings are "employee advancement, appraisal...records" under section 832.8 because they contain the ranking of officers for promotion to detective based on test scores and promotability points. The document clearly relates to each officer's employment advancement and appraisal. Even though not located in an individual officer's personnel file, the document is a personnel record of each listed officer.

This does not dispose of all the records at issue. There are some records that are from Plaintiffs' own personnel files, including investigative reports. The City argues that it has the privilege to prevent another person from disclosing official information obtained in confidence by an employee in the course of his or her duties. Ev. Code §1040. It states that it will waive its right to maintain the confidentiality of Plaintiffs' personnel records if they sign a waiver. Whatever the City's rights in this regard, they are outside the scope of this application. Therefore, Plaintiffs are not required to return records from their own personnel files, including internal affairs investigations of them, as part of the application seeking the return of police personnel records under section 832.7.

Finally, there is OR 402, OR1034, and CG402, which are Justice Data Interface Control printouts for police business use only. Stehr Decl. ¶5; (2) While these records may be protected by another privilege (official information), they are not personnel records and are outside the scope of this application.

D. Conclusion

The application for a preliminary injunction requiring the return of documents is granted in part. Except for the documents of which Plaintiffs themselves were the subject and the Justice Data Interface Control printouts, Plaintiffs are ordered to return to the Department the peace officer personnel records identified in the application and destroy any and all electronic copies to the extent they have not already done so.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 10/13/09

DEPT. 85

HONORABLE JAMES C. CHALFANT

JUDGE

A. FAJARDO

DEPUTY CLERK

HONORABLE
#3

JUDGE PRO TEM

ELECTRONIC RECORDING MONITOR

J. DE LUNA, C.A.

Deputy Sheriff

J. CAMPBELL, CSR #11859

Reporter

9:30 am

BC414602

Plaintiff
Counsel

SOLOMON E. GRESEN [X]

OMAR RODRIGUEZ ET AL

Defendant
Counsel

LINDA MILLER SAVITT [X]

VS

BURBANK POLICE DEPARTMENT ET AL

170.6 DAVID P. YAFFE

NATURE OF PROCEEDINGS:

MOTION OF DEFENDANTS FOR RETURN OF DOCUMENTS

The Motion is called for hearing.

Counsel read the Court's tentative ruling.

After argument, the Court rules in accordance with
it's tentative which is amended, adopted and filed
as the final ruling of the Court.

The Motion Commanding Return of Documents is granted.

The Plaintiff and his agents are ordered to return
the Memo.

Counsel for the Respondent is to prepare a proposed
Order and serve it on opposing Counsel to approve as
to form.

This case is now transferred back to Department 37,
Judge Joanne O'Donnell, for all further proceedings.

Counsel for the Petitioner is to give notice.

Amended

FILED
Superior Court of California
County of Los Angeles

Rodriguez, et al. v. Burbank Police
Department
BC 414602

Tentative decision on motion commanding
return of documents: granted **OCT 13 2009**

John A. Clarke, Executive Officer/Clerk
By A. Fajardo, Deputy
ANNETTE FAJARDO

Defendant City of Burbank ("City") moves for an order requiring Plaintiffs Omar Rodriguez ("Rodriguez") *et al.* to return documents in compliance with a previously issued preliminary injunction. The court has read and considered the moving papers, opposition, and reply, and renders the following tentative decision.

A. Statement of the Case

On May 28, 2009, Plaintiffs filed a Complaint against the City, its Police Department ("Department") and various individual Defendants alleging various forms of discrimination and harassment.

On August 6, 2009, Defendants applied *ex parte* for a temporary restraining order ("TRO") and order to show cause ("OSC") re: preliminary injunction restraining Plaintiffs from using any documents from the personnel files of third party police officers in Plaintiffs' possession, and ordering Plaintiffs to gather and return to the City all copies of such records. The court issued a protective order requiring that all Department personnel records in Plaintiffs' possession be collected and maintained in a separate location in Plaintiffs' counsel's office and that such records not be used directly or derivatively pending hearing on the OSC. The parties were directed to file supplemental briefs on the issue of whether the records were personnel records protected by privilege and must be returned to the Department.

On August 27, 2009, the court provided an analysis of what is and is not a protected police personnel record. Based on this framework, the court ordered the parties to meet and confer to evaluate what documents were protected, and ordered that Plaintiffs must return all documents that it agreed were protected and apply to the court for relief for any documents on which the parties disagreed. The court did not rescind its protective order that no documents were to be used pending outcome of the preliminary injunction.

The meet and confer took place, and Plaintiffs returned most of the documents at issue. The City applied *ex parte* on October 1, 2009 for an order of contempt with respect to two remaining documents. The court ordered briefing by opposition and reply.

B. Governing Law

Penal Code section 832.7 provides that peace officer personnel records, and information obtained from these records, are privileged and confidential and shall not be disclosed in any criminal or civil proceeding except by discovery pursuant to Evidence Code Section 1043. *See* Penal Code §832.7 ("peace officer personnel records. . . are confidential and shall not be disclosed in any criminal or civil proceeding, except by discovery pursuant to Section 1043 of the Evidence Code).

"Personnel records" are defined as any file maintained under an officer's name by his or her employing agency and containing records relating to any of the following: "(a) Personal data, including marital status, family members, educational and employment history, home addresses, or similar information. (b) Medical history. (c) Election of employee benefits. (d) Employee advancement, appraisal, or discipline. (e) Complaints, or investigations of complaints,

10/16/09

concerning an event or transaction in which he or she participated, or which he or she perceived, and pertaining to the manner in which he or she performed his or her duties. (f) Any other information the disclosure of which would constitute an unwarranted invasion of personal privacy.” Penal Code §832.8.

Section 832.7 protects peace officer personnel records against disclosure except pursuant to the Pitchess procedures of Evidence Code section 1043 and 1045. See City of Santa Cruz v. Superior Court, (1987) 190 Cal.App.3d 1669. It prohibits any disclosure of police personnel records and is not limited to those made in a legal proceeding. See Copley Press v. Superior Court, (2006) 39 Cal.4th 1272, 1284-86. “[T]he privilege against disclosure of official police records is held both by the individual officer involved and by the police department.” Davis v. City of Sacramento, (1994) 24 Cal.App.4th 393, 401.

Police personnel records are customarily maintained in either a general personnel file or a separate file containing complaints and reports or findings relating to complaints maintained for five years. Penal Code §832.5. However, despite the literal language of section 832.8 in referring to a personnel “file,” the content of the document, not its location, is determinative. Otherwise, a clearly public document such as a newspaper article could be deemed confidential if placed in an otherwise protected personnel file. Therefore, only the types of information enumerated in section 832.8 constitute protected peace officer personnel records. Commission on Peace Officer Standards & Training v. Superior Court, (2007) 42 Cal.4th 278, 290-91. The category of “personal data” in section 832.8 includes the type of information normally supplied by an employee to his or her employer, and does not include information, such as salary arising from the officer’s employment with the police department. International Federation of Professional & Technical Engineers, (2007) 42 Cal.4th 319, 342-43.

B. Analysis

The City contends that Plaintiffs and their counsel remain in wrongful possession of two documents: OR 399, CG 399, PR 1031 and OR 1242 (different versions of the same document, a memo authored by Thor Merich (the “Merich memo”) and CG 385 (detective rankings with the names of some 20 officers).

1. The Merich Memo

According to the Declaration of Chief of Police Tim Stehr (“Stehr”), the Merich memo concerns possible misconduct by a third party City police officer, which also makes reference to former City police officer Christopher Dunn (“Dunn”). The Merich memo was attached as Exhibit B to a complaint in a separate lawsuit filed by Dunn, who is represented by the same counsel as Rodriguez.

Plaintiffs argue that the Merich Memo is not a police personnel record because Penal Code section 832.8(e) requires that a document concerning a complaint, or investigation of a complaint, against a police officer must also pertain to the manner in which the officer performed his or her duties. The Merich Memo apparently concerns a complaint that the officer suborned perjury by encouraging a witness to lie. See Opp. at 3. Plaintiffs argue that it is not part of an officer’s job to suborn perjury, and therefore the memo is outside the scope of section 832.8(e).

This argument is self-defeating. Obviously, suborning perjury is not part of a police

officer's job. Just as obviously, an allegation that an officer suborned perjury relates to the performance of his or her duties.

Plaintiffs also argue that the Stehr declaration does not state that the Merich Memo concerns an event that involves the third party officer as a participant or witness. That may be true, but Plaintiffs admit that the document concerns an allegation against ~~Dunn~~ that he suborned perjury. This admission, coupled with the Stehr declaration, makes the Merich Memo a confidential personnel record of ~~Dunn~~ *the third party*

Plaintiffs argue that Dunn is entitled to the document as his own personnel record. That may or may not be true, but Dunn is not a party to this case. Whether he validly possessed the document to file it as an exhibit in his separate lawsuit is also not an issue in this case. This court's only concern is whether Plaintiffs must be ordered to return the Merich Memo because it is a confidential police personnel record. It is and must be returned.

This raises the issue of the scope of what must be returned. If Plaintiffs improperly provided the Merich Memo to Dunn, or their attorney improperly used the Memo in Dunn's case, in violation of this court's protective order that the documents at issue not be used for any purpose, the crime-fraud exception to the attorney-client privilege may well apply to permit discovery of that fact. The trial court (Judge O'Donnell) apparently has ruled that investigation of the source of the memo would violate the attorney-client privilege. (The word "apparently" is used because Plaintiffs failed to attach the Exhibit I which they contend is a notice of Judge O'Donnell's ruling.) The City argues that the crime-fraud exception applies. The court does not know whether the City presented evidence to Judge O'Donnell concerning the crime-fraud exception before her ruling was made.

In any event, the scope of discovery in this case is for Judge O'Donnell. This court is merely ordering that Plaintiffs must return the Merich Memo, including any copies of the Memo that were distributed or used in violation of the protective order.

2. The Detective Ranking

The other document (OR/CG 385) is a detective ranking involving 20 other officers. Penal Code section 832.8 expressly provides that personnel files include records relating to "employee advancement, appraisal or discipline." Penal Code §832.8(d). A detective ranking relates to employee advancement, and as such is a personnel record. It includes rankings, scores and promotion assessments of officers other than the Plaintiffs.

It is undisputed that this document is a police personnel record, and the court so indicated in its August 27, 2009 analysis.¹

Plaintiffs argue that Rodriguez is entitled to a copy of the detective rankings under POBRA (Gov. Code §3300 *et seq.*) A police officer is entitled to inspect his or her personnel file, and by implication obtain a copy of its contents. *See* Gov. Code §3306.5.

The City argues that Plaintiffs wrongly stated that this document was given to Rodriguez by the City's then Chief of Police, and this has proven to be false. Therefore, the City concludes

¹ Plaintiffs argue that the document is not maintained in any officer's file, but the court has previously ruled that the location of a document is not determinative of whether it is a police personnel record.

that Plaintiffs must return it and Rodriguez may obtain a copy of it in a Pitchess motion.

The problem with the City's argument is that the court previously stated in its framework for analysis that Plaintiffs need not return records that are part of their own personnel file. It does not matter whether Rodriguez misappropriated the detective ranking because the City's application sought the return of confidential police personnel records, not records wrongly misappropriated though Plaintiffs had the right to possess them. Thus, the means by which Plaintiffs obtained the detective ranking is irrelevant *to this application*.

The detective ranking is part of Rodriguez's personnel file. However, Rodriguez would not be entitled to a copy of an unredacted detective ranking; he would only be entitled to a list with his name in a particular order and other names blacked out. Thus, the unredacted detective ranking is a document to which Rodriguez is not entitled.

The City's application for return of the Merich Memo and the detective ranking is granted. Plaintiffs are ordered to return both documents forthwith. Rodriguez may seek a copy of the redacted detective ranking pursuant to Gov. Code section §3306.5.

10/16/09